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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE

In the matter of the Application of Liyanagamage Ranganath Prabashwara Dias, Petitioner, against University of Rochester, Respondent.	Index No.: 2024003035 Hon. Joseph D. Waldorf MEMORANDUM OF LAW IN REPLY **Oral Argument Requested**

MEMORANDUM OF LAW IN REPLY

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PRELIMINARY STATEMENT

Respondent University's Research Misconduct Policy ("the Policy") describes the process for responding to alleged misconduct as one that provides for "an objective examination of the facts [and] protection of individual rights." Doc. 7, pg. 58. This did not occur for petitioner, Dr. Dias, a tenure-track assistant professor at the University in the Departments of Mechanical Engineering and Physics and Astronomy accused of research misconduct. Petitioner has met the standard for a preliminary injunction and would ultimately be successful in his claim. The University's responsive papers are wrong; documentary evidence exists that disproves the allegations petitioner was uncooperative in its sham of an Investigation. The University subjected petitioner to an abhorrently unfair Investigation process, contrary to its established policies and procedures set forth in its Faculty Handbook ("the Handbook"). The University did not provide petitioner with an objective examination of the facts any protection of his rights, or even the simulation of due process, resulting in his being labeled a scientific fraud, with irreparable harm to his reputation and a looming termination.

The University has subjected petitioner to a Research Misconduct Investigation ("Investigation") process so rife with error it cannot be found to be anything other than arbitrary and capricious. It is not even clear which of the at least two versions of the Research Misconduct Policy ("RMP") - one found in the Faculty Handbook, and one found on the University's website, apply in this case. While the University has asserted one version is the controlling document, it has provided nothing to support this assertion.

Although it is unclear which RMP was used as the guiding procedures for this Investigation, what is clear is the University's Investigation began with one of the cardinal sins of due process: presuming petitioner's guilt and determining the outcome before the

Investigation started. With these presumptions and a determination to find petitioner guilty, the University set into place various strategic elements to conduct its predeterminate proceedings, by sanctioning the petitioner during the investigation by removing his students from his lab and teaching and by submitting a retraction request before the investigation was concluded, refusing to examine evidence that may be exculpatory, such as interviewing key witnesses, allowing biased and ill prepared witnesses to determine relevancy of information, and painting petitioner out to be "uncooperative" despite his repeated, earnest attempts to provide requested information, and refusing to allow petitioner to use the Faculty Grievance Procedures to challenge the biased process.

The RMP is not the only Handbook policy the University has violated in this process. Petitioner has filed two grievances related to this Investigation alleging bias and a violation of his academic freedom. Despite following the appropriate procedures outlined by the Handbook to submit his first grievance in August 2023, before the Investigation concluded, and in February 2024, the University has refused to do the same. Twice the University declared it would hear his grievances and now twice reneged on its promise to do so. Most recently, the University placed both grievances on hold, demonstrating its intent to not only disregard its own grievance policies and procedures, but to retaliate against petitioner for utilizing an Article 78 proceeding. The University's flip-flopping approach to this matter is just one of many demonstrable indicators of its clear intention to find petitioner responsible for research misconduct– regardless of what the facts may be.

In each of the RMP policies the University asserts the process is confidential. Despite this promise, the University opposed petitioners' request to file this case under seal, and

subsequently publicly filed hundreds of pages of irrelevant documents outlining intricate details of petitioner's scientific work.

Petitioner faces immediate and irreparable harm. The University seeks to terminate him without providing the due process it promises to him under its own policies. The University's permitting the grievance procedures to continue, as it has now twice promised petitioner it would, will not injure the University in any way. In fact, if the grievance results in a finding petitioner's academic freedom was not abused and no bias against him exists, it will only strengthen its position.

STATEMENT OF FACTS

For a full recitation of the facts related to this matter we respectfully direct this court to petitioner's Affidavit in Reply.

LEGAL ARGUMENT

I. PETITIONER IS ENTITLED TO INJUNCTIVE RELIEF.

To establish entitlement to a preliminary injunction, the party seeking such must establish, by clear and convincing evidence, three separate elements: "(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor." *Doe v Axelrod*, 73 NY2d 748, 750 (NY 1988). Preliminary injunctive relief has generally been limited to "equitable actions where the defendant threatened to violate the rights of the plaintiff respecting the subject of the action, which would tend to render the judgment ineffectual." *Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541, 545 (NY 2000) (citations omitted). Conversely, in a cause of action for pure money damages or specific performance, "there is no right of the plaintiff in some specific *subject* of the action," or in other words, money damages, not injunctive relief, "would be adequate to protect the expectation interest of the injured party." *D&W Diesel v McIntosh*, 307 AD2d 750, 751 (NY 2003); *Sokoloff v Harriman Estate Dev. Corp.*, 96 NY2d 409, 415 (NY 2001).

Petitioner is not requesting money damages, but rather injunctive relief to require the University to follow its own mandatory Faculty Grievance Procedure policies and procedures, outlined in its Handbook.

A. Petitioner demonstrates the likelihood of success on the merits.

As a preliminary matter, respondent's attempt to convince this court that the standard for determining a likelihood of success on the merits asserted in *Cangemi v Yeager* 185 AD3d 1397 (4th Dept 2020) is "facially inapposite" to this matter is flatly wrong. *See* respondent's

Memorandum of Law in opposition to petitioner's motion for preliminary injunction, doc. 75, pg. 5, n. 2. In *Cangemi*, the Appellate Division Court wrote that in case of a request for preliminary injunction, "To demonstrate a likelihood of success on the merits it is sufficient for the moving party to make a prima facie showing of his or her right to relief and the actual proving of the case should be left to the full hearing on the merits." *Cangemi* at 1398 (4th Dept 2020) (cleaned up). This is true whether the subject of the litigation is a property dispute like in *Cangemi*, a breach of contract matter (*see Gambar Enters. v Kelly Servs.*, 69 AD2d 297, 306, 418 NYS2d 818 (4th Dept 1979), or a constitutional challenge of a state law (see *Tucker v Toia*, 54 AD2d 322, 324 (4th Dept 1976).

While Respondent appears to argue that a higher burden of proof should apply to this case because this matter is brought pursuant to NY CPLR Article 78, (doc. 75, pg. 5, n.2), respondent cites no case law in support of its position this position because it is unsupported by the law (see *Weissman v Kubasek*, 112 AD2d 1086, 1086 [2d Dept 1985]; *Melvin v Union Coll.*, 195 AD2d 447, 448-449 [2d Dept 1993]; *Matter of Riccelli Enters., Inc. v State of NY Workers' Compensation Bd.*, 117 AD3d 1438 [4th Dept 2014]). In *Weissman*, petitioners filed an action under NY CPLR 78 seeking to enjoin appellants from interfering with the right of petitioners to serve and act as members of a commission. The trial court granted injunctive relief to petitioners without qualification. On appeal, the Second Department held that the trial court had discretion to grant a preliminary injunction, provided that the application for preliminary injunctive relief established that the party seeking injunctive relief was likely to ultimately succeed on the merits

and would suffer irreparable injury unless the preliminary injunction was granted, and that a balancing of the equities favored granting the preliminary injunction.[1]

Similarly, in *Melvin*, the Appellate Division, Second Department, upheld a preliminary injunction preventing a student from being dismissed from their academic program when there was a factual dispute as to whether the respondent conformed to the disciplinary guidelines as set forth in a handbook. 195 AD2d 447. Petitioner here similarly requests this court intervene to prevent the University from moving forward with its UCTP process to avoid its Faculty Grievance Procedure obligations to petitioner set forth in its Handbook. Also, just as in *Melvin*, the petitioner has adduced adequate evidence of irreparable injury and a balancing of the equities in his favor. 195 AD2d 447. The petitioner has shown that without an injunction to preserve the status quo, the research misconduct Investigation's determination will stand, causing him irreparable injury for which monetary compensation is not adequate. *See* Petitioner Affidavit at ¶¶78-84. Just like in *Melvin*, the respondent here cannot show that it will suffer any harm as a result of the petitioner being afforded the rights pursuant to the Faculty Grievance Procedure. 195 AD2d at 448-449.

To be successful in his underlying claim, petitioner must show (1) he has exhausted his administrative remedies, (2) respondent did not act in compliance with its rules or guidelines, and (3) respondent's determination to find petitioner responsible for research misconduct was arbitrary and capricious.

i.<u>Petitioner has exhausted his administrative remedies.</u>

[1] The court held that petitioners made a sufficient showing to warrant preliminary injunctive relief and that, although the trial court's judgment purported to grant permanent injunctive relief, it was clear that preliminary relief was intended. *See Weissman v Kubasek*, 112 AD2d 1086, 1086 (2d Dept 1985).

Petitioner's administrative remedies in relation to the Investigation have been exhausted. The Investigation concluded, and the Committee found petitioner responsible for egregious violations of the Research Misconduct Policy. *See* doc. 47. That the petitioner has now been referred to the UCTP for a proceeding to abrogate his contract does not, and cannot, change the Investigation's finding. The UCTP body has absolutely no power to change the Committee's determination that petitioner engaged in research misconduct. The Handbook requires that in "cases of research misconduct the hearing committee *will accept* the results of University investigations including but not limited to the related hearing determination and appeal opportunity". Petitioner Affidavit, ¶¶46 and doc. 7, pg. 45-6. Petitioner also has no opportunity to request a review of the Research Misconduct Committee's determination of his responsibility as no appeal process is available.

Similarly, petitioner's administrative remedies in relation to his grievances filed about the Investigation have been exhausted. *See* Petitioner Affidavit ¶43. The University's decision to put both grievances "on hold" until it finishes its contract abrogation proceedings is at best irrational and at worst retaliatory (*see* Petitioner Affidavit ¶37). It is a clear attempt to avoid any of petitioner's faculty peers review of the administration's decisions. The Handbook provides no opportunity for petitioner to appeal this decision to not hear both of petitioner's grievances.

The New York Court of Appeals held that "[t]he arbitrary or capricious test chiefly relates to whether a particular action should have been taken or is justified and whether the administrative action is without foundation in fact. Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." *See Pell v Bd. of Ed. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester Cntv.*, 34 NY2d 222, 313

N.E.2d 321 [1974]; *see also 512-3rd St., Inc. v New York State Liquor Auth.*, 217 A.D.2d 1010, 629 NYS2d 932 (4th Dep't 1995).

ii. The University has not substantially complied with its rules or guidelines: Research Misconduct Policy.

The University has not substantially complied with its rules or guidelines related to its faculty. It is well established that when a university has adopted a rule or guideline establishing the procedure to be followed in relation to that rule must be substantially observed. See *Bennett v Wells Coll.*, [appeal 1], 219 AD2d 352, 356 (4th Dept 1996) (a private college's denying tenure to petitioner faculty member was properly vacated and respondent properly directed to conduct a de novo tenure review, since respondent failed to follow its own rules and procedures in conducting petitioner's tenure review); see generally *Tedeschi v Wagner Coll.*, 49 NY2d 652, 660, (1980); *Matter of Berkeley-Caines v St. John Fisher Coll.*, 11 AD3d 895, 895-896 (2004); *Matter of Mc Connell v Le Moyne Coll.*, 25 AD3d 1066, 1068-1069 (4th Dept 2006).

Respondent's Handbook, approved by its Board of Trustees, "sets forth policies, procedures, and information that, by common consent, are those governing the University faculty as a whole." Petitioner Affidavit, ¶9. While the Handbook makes clear "it is not intended to replace or supersede faculty rules and regulations of the several schools and colleges, or the applicable personnel policies set forth in the University's Human Resources Policies" (*id.*) it makes no such exception for the Research Misconduct Policy.

While it is true the Policy states "The procedures outlined are guidelines only and may be adjusted as needed to accommodate special circumstances" (doc. 7, pg. 58), the circumstances articulated (allegations that originate outside of the University and the need to comply with the reporting and other requirements of external sponsors, particularly as they relate to the timing of

reporting possible misconduct) are not the circumstances the University claims required it to deviate from the Policy.

In this case, NSF, the external sponsor did not require the University to violate its Policy by obtaining outside investigators for participation on the Committee instead of utilizing its faculty. The NSF also did not prohibit the University from including a member from the Research Policy Committee as required by the Policy. Nor did NSF require the University to punish petitioner by removing his students and requesting a retraction of his paper prior to the investigation concluding-an action that should only be taken if a violation of the Policy is found. Instead, the NSF reminded the University:

> *Because a professional reputation is involved, fairness, due process, and confidentiality should be considered paramount. There is no presumption of wrongdoing by Petitioner or anyone else associated with the alleged research misconduct; rather, your confidential investigation should be designed to determine, without preconceptions, whether research misconduct occurred, and if so, who committed it.*

Doc. 6.

Additionally, it is difficult to understand the University's assertion it did not have three faculty members qualified to investigate the allegations who had not been involved in the earlier inquiries (doc 53, para. 40) when petitioner easily identified ten such individuals who could so do. *See* Petitioner Aff., Exhibit K for a list of faculty members qualified to participate in such a review. In explaining the rationale behind not utilizing faculty as required, VP Dewhurst also offers that the University needed outside faculty to give any credibility to its report. *See* doc. 53. This is not required by the NSF either. If all of the procedures contained in the Policy can be abandoned because a University administrator decided it was necessary, the Policy's procedures are essentially meaningless.

The research misconduct policy was most significantly violated because, on the whole, it was not "a process for an objective examination of the facts, protection of individual rights" as the Handbook requires. Doc 7, pg. 58.

iii. The University has not substantially complied with rules or guidelines: Grievance Procedures.

> *The Faculty Grievance Procedures are articulated in the Handbook and state: "After consultation with the provost, any member of the faculty who believes that they have a general grievance that does involve the infringement of academic freedom may request the involvement of a Faculty Grievance Committee. The provost will then refer the case to the University Committee on Tenure and Privileges[…]. If the provost and the University Committee on Tenure and Privileges are unanimous that the grievance is without prima facie merit or if the grievance does not relate to academic freedom and therefore should not be heard, the process may end with the University Committee on Tenure and Privileges submitting a letter to the provost and complainant to this effect.*

Doc 7, pg. 42.

Petitioner brought two general grievances involving the infringement of his academic freedom and requested the involvement of a Faculty Grievance Committee. According to the Grievance Procedures the UCTP was required to "promptly appoint a the [sic] Faculty Grievance Committee which consists of five members selected from a list of 15 tenured faculty members of the University of Rochester nominated by the president or provost [. . .]" Doc. 7, pg. 43. Petitioner filed his first grievance, Grievance 1, on August 3, 2023. After a protracted back and forth and the filing of an Article 78 proceeding, the UCTP finally agreed Grievance 1 involved questions of academic freedom on January 15, 2024. It wasn't until March 7, 2024, that the UCTP appointed a Faculty Grievance Committee. *See* Petitioner Affidavit, ¶28. There is no reasonable interpretation of the word "prompt" that applies to these facts.

Respondent's decisions not to begin its review of Grievance 1 until March 7, 2024 (*see* Petitioner Affirmation, ¶27) seven months after petitioner filed it is unreasonable. The UCTP

initially declined to hear Grievance 1 on the basis it did not have prima facie merit and did not involve academic freedom. *See* doc. 4, pg. 199. The University changed its decision when the UCTP received affidavits from students directly contracting the provost's account of what occurred (*see* doc. 4, pg. 212) is irrational. The submission of additional information by petitioner could only cure a lack of prima facie merit if the UCTP started its evaluation of Grievance 1 inherently biased towards the provost's view of the matter over petitioner's view.

Additionally, the submission of additional evidence could not cure the UCTP's finding Grievance 1 did not involve academic freedom. Nothing about the subject of petitioner's allegations his academic freedom was implicated changed upon his submission of evidence in support of his grievance, rather, apparently the UCTP finally deemed petitioner believable enough to start its process of investigation. While this Faculty Grievance Committee requested, and petitioner did submit, a preliminary statement and list of potential witnesses for Grievance 1 (*see* Petitioner Affidavit ¶28) to petitioner's knowledge no further progress has been made, nor will be made, on Grievance 1 prior to the UCTP's contract abrogation proceedings beginning. University confirmed this by placing Grievance 1 on hold.

Petitioner's second grievance, Grievance 2, was sent to the UCTP on February 15, 2024. *See* doc. 32. Despite this grievance alleging Provost Figlio was intentionally delaying the adjudication of petitioner's prior grievance, on February 28, 2024, Dr. Liesveld informed petitioner that the UCTP was not recognizing his research misconduct investigation grievance because it had to be submitted to Provost Figlio first. *See* Petitioner Affirm. ¶23. Petitioner then promptly submitted his research misconduct investigation grievance to Provost Figlio the following day and on March 1, 2024, Provost Figlio acknowledged receipt. *Id*. at ¶24-5. Also on March 1, 2024, the UCTP confirmed receipt of petitioner's research misconduct investigation.

Id. at ¶26. The UCTP, however, noted it must await a referral from the provost before it could begin the process. *Id.*

To be clear, in order for the UCTP to be able to begin its evaluation of Grievance 2, which complains (among other things) that the provost engaged in significant delaying tactics to prevent Grievance 1 from proceeding before the conclusion of the Investigation, the provost must first officially refer the case the UCTP. While this general irrationality of needing the person being accused of misconduct to act in order to begin the process needed to investigate the misconduct is on its face striking, the lack of discretion the policy allows the provost would, if the policy were followed, cure it. According to the Faculty Grievance Procedures, because petitioner requested a Faculty Grievance Committee, upon the provost's receipt of petitioner's request "[t]he provost *will* then refer the case to the University Committee on Tenure and Privileges". Doc. 7, pg. 42 (emphasis added). The Faculty Grievance Procedures do not use a permissive verb such as "can", "may", or "might", it uses the mandatory verb "will", meaning the provost has no discretion in this referral – he must refer the case to the UCTP. As of the submission of this reply memorandum there is no indication the provost has done so.

Instead, the UCTP confusingly communicated that the unsealing of a document in petitioner's lawsuit against the University, brought to assert his rights pursuant to the Faculty Grievance Procedures, somehow prevented the UCTP from utilizing the Faculty Grievance Procedures to hear Grievance 2. *See* Petitioner Affidavit ¶¶29-33. There is no rational basis for this determination. Far more plausible rationales for the determined "pause" of the Faculty Grievance Procedures include the provost's refusing to refer Grievance 2 to the UCTP or the University seeking to retaliate against petitioner for asserting his right to bring an Article 78 action (once again violating petitioner's academic freedom). *See Id*. at ¶¶30-33.

iv. Respondent's determination to find petitioner responsible for research misconduct was arbitrary and capricious.

An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts. *See Matter of Peckham v Calocrero*, 12 NY3d 424, 911 N.E.2d 813, 883 NYS2d 751 (2009); *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 (1974).

The University has failed, and continues to fail, in its obligations to petitioners' rights according to their own processes. The University's actions demonstrated it presupposed the guilt of petitioner before the investigation concluded, including the facts that the University's Dean Wendi Heinzelman removed all of petitioner' students from his laboratory, teaching, and mentoring, before the investigation concluded, Vice President Dewhurst colluded with other University administrators outside counsel, and a student witness to the investigation, Mr. John Smith[2], a former student of petitioner, with clear bias against petitioner, to request one of petitioner's publications be retracted from the magazine Nature, despite retraction of papers only allowed AFTER a finding of research misconduct had been made.

The University has ignored petitioner's many pleas to have unbiased parties grounding this process, acting as if these biases are irrelevant. Allegations of bias in an Investigation and fact-finding process are always relevant.

As anyone who has conducted an investigation knows, the process is dictated by the language of the relevant policy being investigated. The various RMP documents differ in significant ways, including details regarding the formation and composition of the Investigation Committee ("the Committee"), the provision of documentation related to the Investigation so

[2] Pursuant to his FERPA obligations, petitioner is using a pseudonym for this individual.

that petitioner may appropriately prepare a response, and the manner and appropriate time upon which the University can take remedial action while an investigation is ongoing.

As a result, the University willfully disabled its Investigation to such a ridiculous degree as to prevent it from coming to a sound conclusion, supported by what exists in fact, as to whether or not without preconceptions, whether research misconduct occurred, and if so, who committed it. In short, given that the evidence and the individuals the University used to come to its determination of guilt are so incredible that this outcome cannot be regarded as anything other than arbitrary and capricious in nature.

For a full recitation of the facts related to how respondent's determination to find petitioner responsible for research misconduct was arbitrary and capricious, we respectfully direct this court to petitioner's Affidavit in Reply.

Petitioner is entitled to injunctive relief because he demonstrates the likelihood of success on the merits, he has exhausted his administrative remedies, the University did not act in compliance with its rules or guidelines, and its determination to find petitioner responsible for research misconduct was arbitrary and capricious.

II. PETITIONER CAN ESTABLISH IRREPARABLE INJURY.

In addition to likely succeeding on the merits, petitioner will suffer irreparable harm. The second prong of the test for a preliminary injunction is whether there will be irreparable injury if the provisional relief is withheld. *See Axelrod*, 73 NY2d at 750. "[A]n irreparable injury is an injury that is not remote or speculative but actual and imminent, [] for which a monetary award cannot be adequate compensation." *Dexter 345 Inc. v Cuomo*, 663 F3d 59, 63 (2d Cir 2011). Generally, a plaintiff cannot establish irreparable injury where the damages sustained are calculable, with reasonable precision, because the plaintiff in such a case would have an

adequate remedy in the form of monetary damages. *See D&W Diesel,* 307 AD2d at 751; *see also Sokoloff*, 96 NY2d at 415; *Credit Agricole Indosuez*, 94 NY2d at 545; *Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp.*, 69 AD3d, 212, 221 (4th Dept 2009).

There are, however, circumstances which will warrant an exception to this general rule. *See, e.g., Bregman v Meehan*, 125 Misc 2d 332, 347 (NY 1984) (explaining that an agreement to sell or develop real property is not just a simple contract to lend money); *Van Wagner Adver. Corp v S & M Enters.*, 67 NY2d 186, 192–93 (NY 1986) (explaining that while all goods may arguably be interchangeable for some sum of money, when such is rare and/or unique, a court is more likely to order an injunction or specific performance); *Battenkill Veterinary Equine v Cangelosi*, 1 AD3d 856, 859 (NY 2003) (holding that injunctive relief is appropriate when there is a loss of goodwill associated with a business, loss of patients or clients, or harm to reputation). For example, the unprecedented nature or scope of the subject matter at issue may make it so unique that the market value or damages sustained cannot be calculated with reasonable precision. *Destiny*, 69 AD3d at 221–22; *Van Wagner*, 67 NY2d at 193. Additionally, "an exception is warranted [when there is] . . . enormous potential for harm to [] reputation" of the individual, the business, or the subject matter as a whole. *Destiny*, 69 AD3d at 221 ("Harm to business reputation is harm for which money damages are insufficient and for which injunctive relief may be appropriate."). *See also Really Good Stuff, LLC v BAP Inv'rs, L.C.*, 813 Fed Appx 39, 44 (2d Cir 2010); *Tom Doherty Assocs. v Saban Entm't, Inc.*, 60 F3d 27, 38 (2d Cir 1995) (holding that when "the very viability of the plaintiff's business" is threatened, that itself constitutes irreparable harm).

As an initial matter, it is important to emphasize that contrary to the University's contention that petitioner's injury here is merely the loss or potential loss of employment, and thus, not irreparable harm as a matter of law, petitioner's injury spreads well beyond the mere loss of employment because as a university professor, the University employed him to do much more than just teach and mentor students. *See, e.g., Holt v Continental Group*, 708 F2d 87, 90–91 (2d Cir 1983) (explaining that additional injuries or circumstances beyond those that naturally flow from employment discharge such as financial distress or inability to find additional employment may establish irreparable injury). In fact, through its employment contracts and business contracts with petitioner and his business, Unearthly Materials, the University specifically encouraged petitioner to conduct research, submit for science grants, and publish his work in scientific journals. For example, in petitioner's initial employment contract with the University in 2017, Dean Heinzelman wrote that ". . . the faculty member must provide documentation that he or she is in residence and actively engaged in research activities throughout the three-month period [summer]. It is expected that you will submit at least one grant that requests summer salary[.]" *See* Petitioner Affidavit, Exhibit (employment contracts) A, page 2. Additionally, in petitioner's unanimous 2020 retention letter, Dr. Renato Perucchio, Professor and Chair of the Hajim School of Engineering & Applied Sciences at the University, wrote the following:

> *Our overall consensus is that you should continue to establish a strong publication record from research done at the University of Rochester, especially since your funded research success is highly satisfactory. In summary, as goals for the next three years, I identify: (i) Apply for a NSF and/or DOE CAREER grant. (ii) Continue on strong and successful grants applications. (iii) Continue on good publication pace, especially for work in the [Petitioner] lab with the [Petitioner's] research team. (iv) Continue on strong collaboration with LLE in the exciting area of high pressure materials science, while maintaining the DAC research in the [Petitioner] lab. (v) Continue with service at the university and national levels, thus*

> *promoting name recognition in the wider scientific community on the way to the tenure milestone. (vi) Continue on a strong mentoring role with your PhD students.*

See Petitioner Affidavit, Exhibit (employment contracts) A, page 6. In fact, in petitioner's 2021 retention letter, Dean Heinzelman stated that in hopes that petitioner would stay with the University, they would "provide [him] with increased time to further [his] ground-breaking research on room temperature superconductivity," and would "reduce[] [his] teaching load to one undergraduate course a year for three academic years[.]" *See* Petitioner Affidavit, Exhibit (employment contracts) A, page 9.

Simply put, this is not a case of mere loss of employment as the University claims, and truly extraordinary circumstances that warrant preliminary injunction are present. *See Oliver v New York State Police*, 812 Fed Appx 61, 63 (2d Cir. 2020); *Talukder v New York*, 2023 U.S. Dist. LEXIS 92635 at *13 (SDNY 2023). More specifically, these injuries are beyond those that ordinarily flow from employment termination and include the loss of revolutionary research opportunities and patents, loss of business ventures, and significant harm to petitioner's business reputation within the academic and scientific community. *See Peck v. Montefiore Med. Ctr.*, 987 F Supp 2d 405, 412 (SDNY 2013); *Doherty Assocs.*, 60 F3d at 38.

Additionally, the Appellate Court's examination of preliminary injunction law in New York State in *Destiny* provides instructive and persuasive guidance for the analysis here. 69 AD 3d 212. While the factual circumstances in *Destiny* are different than those present here, nothing in the Court's opinion or analysis of preliminary injunctions, and more specifically, irreparable harm, can reasonably be read as limiting its conclusions and reasoning to only the factual circumstances in which the case arose (i.e., property disputes). *See generally id.* In *Destiny*, plaintiff and defendant entered into a financing agreement for the development of a major

commercial project, which utilized new types of environmentally friendly components and financing. *Id.* at 214–15. Plaintiff later sought a preliminary injunction, compelling the funding of pending loan advances, or alternatively enjoining defendant from refusing to fund such. *Id.* The Court concluded that plaintiff, Destiny USA, would suffer irreparable harm if defendant did not continue to fund the project advances for several reasons, but most importantly because the unique nature of the project made it difficult to adequately assess money damages. *Id.* at 220–3. In support of this conclusion, the Court explained that defendant itself spent a significant amount of time highlighting the project's "revolutionary," "ground-breaking," and "visionary" character; thus, the market value for such an unprecedented project and scope could not be calculated with reasonable precision. *Id.* at 221. In other words, measuring money damages requires an assessment of "the volume, refinement, and reliability of the available information about substitutes for the subject matter," and when the subject matter is determined to be so unique or ground-breaking, the relevant information needed to evaluate such will either be too thin or unreliable that "there is a substantial risk that an award of money damages will [] fall short of the [party's] actual loss." *Destiny*, 69 AD3d at 221–2 (quoting *Van Wagner*, 67 NY2d at 193) (explaining that when a court determines that the subject matter at issue is unique and has no established market value, "a court is really saying that it cannot obtain, at reasonable cost, enough information about substitutes to permit it to calculate an award of money damages without imposing an unacceptable high risk of under[]compensation on the injured [party].").

Much like the court found in *Destiny*, a case from this millennium, the unique, highly skilled, and complex character of petitioner's work and research at the University renders it difficult to calculate any damages sustained by him. *See Destiny*, 69 AD3d at 221. Petitioner works in "the highly competitive specialized field of low-temperature, high-pressure

superconductivity." Doc. 5, ¶5. The University's own words, and petitioner's numerous accomplishments as a researcher illustrate the uniqueness of petitioner's work. For example, according to Dr. Renato Perucchio, Professor and Chair of the HAJIM School of Engineering & Applied Sciences at the University, petitioner's "funded research efforts have been impressive . . . The results of [his] research are impactful." *See* Petitioner Affidavit, Exhibit (employment contracts) A, page 5–6. More specifically, he states that petitioner's research is "noteworthy," "gaining national visibility" and its attention "clearly indica[tes] that [his] research is seen to be exciting and having a high impact." *Id.* ("Since 2013, you have given 18 invited talks, including four in the exclusive Gordon Research Conferences which concentrate in significant materials and physics challenges and draw the top academic researchers. In addition, your research has drawn significant media attention, for example by the New York Times, BBC Podcast Science, NPR Science Friday, the Independent newspaper and, perhaps surprisingly, in the Rachel Maddow Show."). Dr. Perucchio further states that petitioner "maintain[s] a strong publication record in high visibility journals, [and] . . . develop[ed] [his] *own signature* research." *Id.* (emphasis added). In 2021, Dean Heinzelman referred to petitioner's work on room temperature superconductivity as "ground-breaking." *See* Petitioner Affidavit, Exhibit (employment contracts) A, page 9. Because petitioner's research and employment with the University is so unprecedented and unique in kind, nature, and scope, there is simply "no established market value" for such work and "any damages sustained could not be calculated with reasonable precision." *Destiny*, 69 AD3d at 221; *see also Van Wagner*, 67 NY2d at 193. Petitioner, therefore, will suffer irreparable harm.

Moreover, as explained above, the case law is clear that "harm to business reputation is harm for which money damages are insufficient and for which injunctive relief may be

appropriate." *Destiny*, 69 AD3d at 222. *See also M.V. Music v V.P. Records Retail Outlet, Inc.*, 653 F Supp 3d 31, 39 (EDNY 2023) ("'[L]oss of reputation, goodwill, and business opportunities" can constitute irreparable harm'" quoting *Register.com, Inc. v Verio, Inc.*, 356 F3d 393, 404 [2d Cir 2004]). While the University is correct that faculty members voluntarily part ways all the time, the University wholly fails to consider the specialized nature of the subject matter in which petitioner taught, researched, and operated a business within. Unlike ordinary employees whose employment is terminated, petitioner's employment history is intimately related to his professional business reputation within this field. *See Doherty Assocs.*, 60 F3d at 38. As a scientific researcher, academic, and co-founder of Unearthly Materials, *within this field*, petitioner's livelihood *is* his business, and significantly depends on his professional resume and ventures. *See* Petitioner Affidavit, ¶5. An involuntary termination from the University that owns the intellectual property rights at the center of Unearthly Materials business, where petitioner also spent the last seven years of his career, threatens the very viability of his and Unearthly Material's business. *See* Petitioner Affidavit, Exhibit T (Patent Agreement).

Additionally, this injury is neither speculative, remote, nor self-serving. Petitioner's involuntary termination from the University is highly likely, considering Provost Figlio's premature acceptance of the Investigative Report, and petitioner's potential termination would be easily learned by others. In fact, a google search of petitioner's name reveals that several visible sources, like *Nature*, the *New York Times*, *American Physical Society*, and *Scientific American*, have already publicly discussed petitioner's ongoing misconduct allegations and his present status at the University. Furthermore, the likelihood of irreparable harm to one's business reputation is not diminished simply because they invited or sought public intrigue or discourse to build such a reputation. It seems perverse to use the fact that petitioner developed a public

reputation – something all entrepreneurs and academic researchers must do – against him when assessing the injury that would occur to such reputation.

In this case, petitioner clearly will suffer actual, imminent, and irreparable injuries that extend beyond those that normally accompany termination of employment. Because of petitioner's highly specialized and unique research, any damages sustained cannot be calculated with reasonable precision, and involuntary termination threatens the very viability of his and Unearthly Material's business.

III. PETITIONER CAN SHOW THE BALANCE OF EQUITIES WEIGHS IN HIS FAVOR.

As required, the balance of equities also favors petitioner and weighs in favor of granting a preliminary injunction. In determining whether the balance of the equities tips in a plaintiff's favor and whether granting a preliminary injunction would be in the public interest, the court must inquire into "whether the irreparable injury to be sustained . . . is more burdensome [to the plaintiff] than the harm caused to [the] defendant through imposition of the injunction." *See Smith v Smith*, 217 AD3d 1484, 1487 (4th Dept 2023) (quoting *Eastview Mall, LLC v Grace Holmes, Inc.*, 182 AD3d 1057, 1059 (4th Dept 2020). *See also Winter v NRDC, Inc.*, 555 US 7, 24 (2008) (holding that the court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief."); *TomGal LLC v Castano*, 2022 U.S. Dist. LEXIS 231415 at *15 (SDNY 2022).

Equities usually tip in favor of the party who would be irreparably harmed absent the grant of the preliminary injunction. *See Sau Thi Ma v Xuan T. Lien*, 198 AD2d 186, 186–87 (1st Dept 1993); *Matter of New York State Off. Of Victim Servs. v Wade*, 79 Misc 3d 254, 261 (Sup Ct, Albany County 2023) ("Where the movant [] satisfies both the merits and irreparable injury

prongs, the balance of equities always tips in that party's favor absent some greater hardship that the nonmovant would suffer should the injunction issue."). Additionally, equities may tip in favor of the moving party to maintain the status quo where denial of injunctive relief would result in an ineffectual final judgment. *See Barbes Rest. Inc. v ASRR Suzer 218, LLC*, 140 AD3d 430, 432 (1st Dept 2016).

Here, the balance of equities clearly tips in favor of petitioner. Not only did petitioner establish a likelihood of success on the merits and an irreparable injury, but the grant of a preliminary injunction will maintain the status quo and ensure that this court does not issue an ineffective final judgment. *See Barbes*, 140 AD3d at 432; *Sau Thi Ma*, 198 AD2d at 186. While the University claims granting a preliminary injunction infringes on its right to make decisions about its faculty, this right is not as absolute as claimed, and a preliminary injunction in this case does not prevent the University from making those decisions. Instead, it maintains the status quo to ensure that a decision to terminate a faculty member is made in fairness, and in full accordance with the University's own policies and procedures. This protects the University much like it protects petitioner and the public. Conversely, as discussed above, denial of a preliminary injunction will result in significant, irreparable injuries to petitioner, and would deprive him of the benefits of the University's own grievance policies.

The University fails to prove petitioner cannot show the balance of equities weighs in his favor by not citing any persuasive case law or facts demonstrating why the equities should be tipped in its favor or otherwise not tipped in petitioner's favor.

CONCLUSION

Based on the foregoing, and for all the reasons previously enumerated in petitioner's NY CPLR Article 78 filings, Petitioner respectfully requests that this court grant his motion for Preliminary Injunction, prohibiting the University from allowing or utilizing any University Committee on Tenure and Privileges proceedings related to the termination of petitioner until the University properly adjudicates petitioner's grievances, and all appeals processes related to those grievances have been exercised.

Dated: April 4, 2024

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22 N.Y.C.R.R. 202.8-b CERTIFICATION

I, J. Morgan Levy, hereby certify that the foregoing memorandum of law in reply to both the University's Memorandum of Law in Opposition to the Verified Petition (28 pages) and Memorandum of Law in Opposition to Petitioner's Motion for Preliminary Injunction (11 pages), was prepared on a computer using "Times New Roman" typeface, in 12-point size, with double-line spacing, and that the total number of words in the memorandum of law in reply, exclusive of its caption, table of contents, table of authorities, signature block, and N.Y.C.R.R. 202.8-b Certification, as calculated by the word processing system used to prepare this brief is about 6,674 words.

According to N.Y.C.R.R. 202.8-b(f), the Court, may, upon written application and notice to all parties, permit the submission of such papers that exceed the limitations set forth in N.Y.C.R.R. 202.8-b(a) and (d). As such, please accept Petitioner's combined papers, totaling 23 pages and about 6,674 words in reply.

Dated: April 4, 2024

/s/J. Morgan Levy
J. Morgan Levy, Esq.